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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JAMARR WILLIAMS, Defendant and Appellant.	B208224 (Los Angeles County Super. Ct. No. BA319583)

APPEAL from a judgment of the Superior Court of Los Angeles County, Jose I. Sandoval, Judge. Affirmed as modified.

Jeffrey S. Kross, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

Jamarr Williams was convicted by a jury of one count of attempted willful, deliberate and premeditated murder and one count of assault with a firearm with true findings on a number of related criminal street gang and firearm-use allegations. On appeal Williams contends the trial court erred in denying his motion for a new trial based on his counsel's failure to present available exculpatory evidence and the court erred in imposing a determinate 10-year term for the gang enhancement on the attempted murder count. The People agree the trial court imposed an unauthorized term for the enhancement, and we modify Williams's sentence to correct the error. As modified, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Drive-by Shooting and Identification of Williams*

The area south of East Florence Avenue between Central Avenue and Broadway in South Los Angeles (just east of the Harbor Freeway) is claimed by the 79 Swans street gang. Williams is a member of 79 Swans. A portion of the same area is also claimed by the Seven-trey Hustlers, a much smaller gang. Although the two gangs have at times had a truce, in the period prior to the shooting at issue in this case, they had fought over their overlapping territory; and members of each gang had engaged in drive-by shootings targeting their rivals.

On March 26, 2007 at approximately 1:30 p.m. the victims, Roody Wade, Jr. and Maurice Luster, both members of Seven-trey Hustlers, were walking in an alley a few blocks south of East Florence Avenue near Wade's home. They were approached from behind by a black-and-white colored automobile. A man inside the car fired several gunshots at Wade and Luster. Wade was hit in the left leg and was treated for his injury at Huntington Memorial Hospital.

Los Angeles Police Detective George Bashai interviewed Wade at the hospital. Wade said he had seen a black-and-white car earlier in the day. He saw the car again about 1:20 p.m. as he and his friend were walking in their neighborhood. When the car started coming toward him, he ran into the alley, where he was shot. Wade told Bashai

the shooter was known to him as "Toon" or "Lil Toon," a member of the 79 Swans gang. He did not know the shooter's real name, but described him as a Black male, 20 to 25 years old, between six feet and six feet two inches tall and weighing approximately 170 pounds. Wade said the shooter lived in a pink apartment building on 74th Street between McKinley Avenue and Wadsworth Avenue.[1] Wade's father was present during the interview.

After returning to the police station, Detective Bashai determined that Williams used the street names or monikers "Toon" or "Lil Toon." He prepared a photographic display including photographs of Williams and five other men. Los Angeles Police Detective Thomas Marchetti received the photographic display from Bashai and subsequently showed it to Wade at Wade's home. Wade's father was again present during the session. Wade circled Williams's photograph and wrote, "The person in [photograph] number three was the person who shot me. He drove up in a black Chevy police car and fired five shots at me and hit me in the leg." At trial, however, Wade recanted his identification, denying he had seen the shooter or had identified him to the police. Although Wade admitted he had circled Williams's photograph when shown the display, he insisted he did so at the urging of one of the police officers.

Wade's father contradicted his son's description of the photographic identification, testifying at trial that Wade had told the police he knew the person who shot him and had circled Williams's picture of his own free will. Wade's father also testified he had been outside checking his parked van earlier in the day and had seen Williams slowly driving past his home in a black-and-white car.

On the evening of the shooting Los Angeles Police Officer Enrique Robledo noticed an old, auctioned-off black-and-white police car parked near 80th Street and McKinley Avenue. Robledo looked inside the car and saw red jackets (the color associated with the 79 Swans gang). Robledo knew Williams from numerous street

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[1] Williams lived in a pink building at 838 74th Street between McKinley and Wadsworth Avenues.

contacts during the prior seven years. As Robledo was looking at the car, Williams approached and asked what he was doing. (A number of other 79 Swans members were also present in the immediate area.) Robledo said he was just looking, and Williams offered to have someone go get the keys to open the car. Shortly thereafter, someone yelled "gun" as a gray car sped past. Robledo chased the car, which stopped in front of Luster's home. Luster jumped out of the car, went into the house and initially refused to come out. (He later explained he ran into his house because he had an outstanding arrest warrant.) Officers surrounded the house. When Luster finally came out 20 to 30 minutes later, there was blood on his shoes. Luster explained the blood was from a friend (Wade) who had been shot.

Luster told Robledo he knew who had shot his friend. The photographic display previously shown to Wade was shown to Luster, who immediately circled Williams's photograph. He wrote, "Because I recognize his face that shot my friend today, Roody Wade, person in photo number three." Luster also recanted his identification of Williams at trial, denying he had seen the shooter or had identified the shooter to the police.

2. *The Charges*

Williams was charged with the attempted willful, deliberate and premeditated murder of Wade (court 1) and Luster (count 2). (Pen. Code, §§ 664, 187.)[2] It was specially alleged that both offenses were committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further or assist in criminal conduct by gang members (§ 186.22, subd. (b)). It was also specially alleged that in the commission of both offenses a principal personally used a firearm, personally and intentionally discharged a firearm and personally and intentionally discharged a firearm proximately causing great bodily injury to Wade (§ 12022.53, subds. (b), (c), (d), (e)) and that in the commission of the offenses Williams personally inflicted great bodily injury on Wade (§ 12022.7).

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[2] Statutory references are to the Penal Code.

3. *The Trial and Verdict*

The People's witnesses described the shooting and the identification of Williams, as discussed above. Los Angeles Police Officer Jesse Reyes testified as a gang expert and opined, in response to hypothetical questions based on the testimony given in this case, the shooting was committed for the benefit of the 79 Swans gang and with the specific intent to further its activities. Williams's membership in 79 Swans and 79 Swans' status as a criminal street gang within the meaning of section 186.22, subdivision (f), were not contested.

Williams did not testify in his defense. Tracy Dorsey, who lives in the neighborhood and owns a local beauty school, testified as a defense witness. Dorsey said she had known Williams for three years and was a friend of his. According to Dorsey, there were many black-and-white former police vehicles in the area because it was easy and inexpensive to purchase them at auction. She identified two such cars from defense photographs. Dorsey also testified Williams's black-and-white car had been parked on the street near her business for two or three days before the shooting, ever since it had been involved in a traffic accident. Dorsey explained the car was "drivable," but Williams had given her the keys "because if he keep the keys, he was going to be able to ride around in it and he was going to be wanting to get it fixed up, so he gave me the keys to keep."

The jury convicted Williams of the attempted willful, deliberate and premeditated murder of Wade and found true all the special allegations relating to personal firearm use and infliction of great bodily injury, as well as the allegation the offense was committed for the benefit of and with the specific intent to further or assist in criminal conduct by gang members. The jury found Williams not guilty of the attempted murder of Luster, but convicted him of the lesser included offense of assault with a firearm. It found not true as to this count the special allegation that Williams had personally and intentionally discharged a firearm proximately causing great bodily injury, but found the other firearm-use and criminal street gang allegations true.

4. *Williams's New Trial Motion*

Williams was represented at trial by appointed counsel. Following his conviction but prior to sentencing, Williams retained private counsel, who filed a new trial motion pursuant to section 1181 based on his trial counsel's failure to present evidence (i) indicating Williams's automobile had been involved in an accident on March 24, 2007, two days before the shooting, and was inoperable at the time of the drive-by shooting and (ii) establishing an alibi for Williams, who purportedly had accompanied his mother and his half-brother to a meeting with his sibling's probation officer in the early afternoon of March 26, 2007 when the shooting occurred. In support of the motion Williams's new counsel proffered a Los Angeles Police Department traffic collision report concerning an accident on March 24, 2007 involving Williams and his black-and-white, 1995 Chevrolet Caprice and three reports from a private investigation service summarizing investigators' conversations with Williams's mother, Sandra Hayes, Williams's half-brother, Shondell Henderson, and April Malone, who lived near the site of the March 24, 2007 automobile accident. In addition to contending this material constituted newly discovered evidence within the meaning of section 1181, subdivision (8), Williams's counsel argued the trial court has the power to grant a new trial on grounds not specifically enumerated in section 1181 to ensure the accused has received a fair trial, citing, among other cases, *People v. Fosselman* (1983) 33 Cal.3d 572.

At the hearing on the motion Williams's counsel again argued the police report constituted newly discovered evidence—what he termed "the strongest argument" for a new trial—and also argued a new trial was warranted because the alibi witnesses were never called to testify even though "one or two of them may have sat through the full trial." Asked by the court whether there was a statement by the probation officer or some other document verifying that Williams was at a different location at the time of the drive-by shooting, Williams's counsel conceded, "I don't have that before the court." Concluding his argument, counsel asserted Williams did not receive a fair trial "due to

the fact that evidence was out there, it was just never retrieved, but it was in existence as the court can see due to the police report . . . ." The court asked, "Due to failure on behalf of his trial counsel?" Williams's counsel replied, "You know, I don't want . . . ." The court apparently interrupted defense counsel at this point and said, "If the evidence was out there, that counsel had the opportunity to use this information, and obviously speak to his client about alibi witnesses and present them to the court during the trial."

Williams's counsel submitted without making any further statement. The prosecutor then responded to the motion by arguing the evidence attached to the moving papers had been available to trial counsel or was discoverable with reasonable diligence prior to trial, as the court had indicated in its final comment to Williams's attorney. Accordingly, the prosecutor asserted, section 1181, subdivision 8, did not apply. "What we're talking about here is essentially ineffective assistance of counsel claim, which is proper for appeal, not a new trial motion under [section 1181, subdivision 8]." In reply Williams's counsel noted he had argued in his moving papers the court's power to grant a new trial was not limited to the specific subdivisions of section 1181: "There's substantial case law that says the trial court has broad discretion to grant a new trial whenever an accused is denied a fair and impartial trial. So that's my argument. Sure. I'm also claiming 1181, some of those subsections apply, but looking at the totality of the circumstances, my client, Mr. Williams, did not receive a fair trial. If the court wants to rule that it's due to ineffective assistance of counsel, so be it."

After taking the matter under submission the trial court denied the motion for a new trial, concluding that the information presented was available to the defense at the time of trial and thus did not constitute newly discovered evidence under section 1181, subdivision 8. The court did not address the claim of ineffective assistance of counsel as the basis for a new trial.

5. *Sentencing*

The trial court sentenced Williams to an indeterminate life sentence on count 1, the attempted murder of Wade, plus a consecutive term of 25 years to life for the most serious firearm-use enhancement (§ 12022.53, subd. (d)), plus a consecutive term of 10 years on the criminal street gang enhancement (§ 186.22, subd. (b)(1)(C)) and a consecutive three year term (the middle term) on the lesser count 2 offense of assault with a firearm, plus a consecutive term of 10 years for the criminal street gang enhancement.

DISCUSSION

1. *The Trial Court Did Not Err in Denying Williams's New Trial Motion*

Section 1181, subdivision 8, provides the court may grant a new trial "[w]hen new evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial."[3] Williams does not assert the trial court erred in concluding the traffic collision report and summaries of witness statements submitted with his new trial motion could have been discovered prior to trial and does not argue on appeal his motion should have been granted on this ground.

Williams is correct, however, although ineffective assistance of counsel is not a statutory ground for granting a new trial under section 1181, a claim of ineffective assistance may be presented to the trial court as a ground for granting a new trial motion.[4] "[I]n appropriate circumstances justice will be expedited by avoiding appellate review, or

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[3] Section 1181, subdivision 8, also provides, when a defendant moves for a new trial on the ground of newly discovered evidence, "the defendant must produce at the hearing, in support thereof, the affidavits of the witnesses by whom such evidence is expected to be given." Williams's motion failed to comply with this requirement: No affidavits or declarations were submitted from the three additional witnesses he identified. Indeed, he did not even submit the hearsay reports from his private investigators summarizing their interviews with these witnesses in the form of affidavits or sworn declarations.

[4] Although Williams's counsel expressly identified the claim of ineffective assistance of counsel only at the very end of his argument at the hearing on the motion, we reject the People's contention the issue was not properly raised in the trial court.

habeas corpus proceedings, in favor of presenting the issue of counsel's effectiveness to the trial court as the basis of a motion for new trial. If the court is able to determine the effectiveness issue on such motion, it should do so." (*People v. Fosselman, supra,* 33 Cal.3d at pp. 582-583; see *People v. Callahan* (2004) 124 Cal.App.4th 198, 209 ["[a]lthough ineffective assistance of counsel is not among the grounds enumerated for ordering a new trial under Penal Code section 1181, motions alleging ineffective assistance are permitted pursuant to 'the constitutional duty of trial courts to ensure that defendants be accorded due process of law'"]; *People v. Andrade* (2000) 79 Cal.App.4th 651, 659.) We review the denial of a motion for a new trial de novo when claimed errors of constitutional magnitude are at stake (*People v. Albarran* (2007) 149 Cal.App.4th 214, 224-225 & fn. 7; see *People v. Ault* (2004) 33 Cal.4th 1250, 1260-1262), although we must defer to the trial court's express or implied findings if supported by substantial evidence. (*Albarran,* at pp. 224-225; see *People v. Taylor* (1984) 162 Cal.App.3d 720, 724.)

A defendant claiming ineffective assistance of counsel in violation of his Sixth Amendment right to counsel must show not only that his or her counsel's performance fell below an objective standard of reasonableness under prevailing professional norms but also that it is reasonably probable, but for counsel's failings, the result would have been more favorable to the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694 [104 S.Ct. 2052, 80 L.Ed.2d 674]; *In re Jones* (1996) 13 Cal.4th 552, 561.) "'The burden of sustaining a charge of inadequate or ineffective representation is upon the defendant. The proof . . . must be a demonstrable reality and not a speculative matter.'" (*People v. Karis* (1988) 46 Cal.3d 612, 656.) There is a presumption the challenged action "'might be considered sound trial strategy'" under the circumstances. (*Strickland,* at p. 689; accord, *People v. Dennis* (1998) 17 Cal.4th 468, 541.) On a direct appeal a conviction will be reversed for ineffective assistance of counsel only when the record demonstrates there could have been no rational tactical purpose for counsel's challenged act or omission. (*People v. Lucas* (1995) 12 Cal.4th 415, 442 ["[r]eviewing

courts reverse convictions on direct appeal on the ground of incompetence of counsel only if the record on appeal demonstrates there could be no rational tactical purpose for counsel's omissions"]; *People v. Mitcham* (1992) 1 Cal.4th 1027, 1058 ["'[i]f the record sheds no light on why counsel acted or failed to act in the manner challenged, "unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation," [citation], the contention [that counsel provided ineffective assistance] must be rejected'" (second set of brackets in original)].)

Considering the additional evidence presented with the new trial motion (a traffic collision report and summaries of statements from two of Williams's close family members and a neighbor who witnessed the traffic accident two days before the shooting), it is not difficult to suggest valid tactical reasons supporting counsel's decision not to use any of it at trial. Williams's primary defense, presented by his friend Dorsey, was that he had given his car keys to her following the traffic accident because he was concerned about driving the car before having it repaired. (Dorsey specifically testified the car was "drivable.") Dorsey also testified there were a number of other black-and-white, former police cars in the neighborhood. One of those cars, not Williams's, the defense suggested, must have been used in the drive-by shooting.

The additional evidence concerning the extent of the damage to Williams's black-and-white car was internally inconsistent and, even as favorably construed in the new trial motion, would have seriously undermined the credibility of Dorsey, who was the primary defense witness. The opinions of Hayes (Williams's mother) and Malone that the car was inoperable following the accident was directly at odds with Dorsey's testimony it was "drivable" and was also in conflict with the traffic collision report, which indicated the damage to the car was "minor," rather than "major" or even "mod[erate]." Although the report itself is consistent with Dorsey's testimony the car had been in an accident but was "drivable," that point (putting aside the issue of the custody of the keys) was not disputed. It would not have benefited Williams to have additional evidence corroborating that fact.

With respect to the purported alibi testimony, the summary of Hayes's statement reflects only that she drove her son Henderson to an appointment at the probation department sometime on March 26, 2007, accompanied by Williams. There is no indication of the time of day. Standing alone, therefore, it did not assist Williams. In fact, the summary of Henderson's statement reports the trip to the probation department with Hayes and Williams occurred from approximately 11:00 a.m. to noon, providing no defense to the charge Williams shot at Wade and Luster at 1:30 p.m. (It was estimated the drive from the home to the probation office would only take from five to 10 minutes.)

According to the defense investigators, however, Henderson said he did not see his probation officer on that initial trip. After returning home, he and Williams telephoned a friend who picked them up about 1:00 p.m. to go back to the probation office. Once there, he met with the "officer of the day" (because his assigned probation officer was not available) and the three men returned home approximately one hour later—that is, after the 1:30 p.m. shooting.

As discussed, Henderson's statement is provided only in an unsworn summary from a private investigator, not in a declaration under penalty of perjury. There is no corroboration of the second, afternoon visit by the probation officer or even from the friend who allegedly drove the men there. Nor does Hayes, who according to Henderson was at home when he and Williams left for the second trip to the probation office, mention this trip in her statement. Assuming this information was available to trial counsel and not simply a recently contrived tale,[5] given Henderson's close familial relationship to Williams and the absence of any independent verification of the events he described, counsel may well have concluded it would have been of no benefit to present such a dubious alibi defense.

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[5] There is no indication that Williams, Hayes, who was present at trial, or Henderson ever told trial counsel that Williams was at the probation office at the time of the shooting.

To be sure, additional supporting information may exist for an alibi defense, and trial counsel may have been deficient in failing to pursue it. At this point we simply do not know why trial counsel did not present any testimony regarding the purported afternoon visit by Williams and Henderson to the probation office. "A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) "An appellate court should not . . . brand a defense attorney incompetent unless it can be truly confident all the relevant facts have been developed." (*Id*. at p. 267.)

2. *The Trial Court Erred in Sentencing Williams to a Consecutive Term of 10 Years for the Gang Enhancement on the Attempted Murder Count*

Section 186.22, subdivision (b)(1), requires the trial court to impose certain additional, consecutive terms of imprisonment to the punishment prescribed for a felony committed for the benefit of a criminal street gang—the additional term being 10 years for a violent felony (§ 186.22, subd. (b)(1)(C)), except as specified in section 186.22, subdivision (b)(4) or (5). In place of the 10-year sentence enhancement, section 186.22, subdivision (b)(5), provides any person who for the benefit of a criminal street gang commits a felony punishable by an indeterminate life term "shall not be paroled until a minimum of 15 calendar years have been served."

Williams contends, and the People agree, the trial court erred in sentencing him to a consecutive term of 10 years for the section 186.22, subdivision (b)(1)(C) enhancement on count 1, attempted willful, deliberate and premeditated murder, for which he received an indeterminate life term (§ 664, subd. (a)).

An unauthorized sentence may be corrected at any time regardless of whether an objection was made in the trial court. (*People v. Smith* (2001) 24 Cal.4th 849, 854.) Section 186.22, subdivision (b)(5), provides for a minimum parole eligibility term of 15 years for "any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life." Because Williams was sentenced to an indeterminate life term for attempted willful, deliberate and premeditated murder on count 1 (plus a consecutive term of 25 years to life for discharging a firearm

causing great bodily injury pursuant to section 12022.53, subdivision (d)), the parole eligibility restriction contained in subdivision (b)(5) applied; and the 10-year sentence enhancement set forth in subdivision (b)(1)(C) should not have been used. (*See People v. Lopez* (2005) 34 Cal.4th 1002, 1009-1011.) Accordingly, the 10-year enhancement must be stricken, and the abstract of judgment with respect to the sentence for count 1 corrected to include the minimum parole eligibility term of 15 years pursuant to section 186.22, subdivision (b)(5).

DISPOSITION

The judgment is modified to strike the 10-year enhancement imposed on count 1 pursuant to section 186.22, subdivision (b)(1), and to reflect instead imposition of a 15-year minimum parole eligibility date pursuant to section 186.22, subdivision (b)(5). As modified, the judgment is affirmed. The abstract of judgment is ordered corrected to reflect on count 1 the imposition of an indeterminate life term with a minimum eligible parole date of 15 years pursuant to section 186.22, subdivision (b)(5), plus a consecutive term enhancement of 25 years to life pursuant to section 12022.53, subdivision (d). The superior court is directed to prepare a corrected abstract of judgment and to forward it to the Department of Corrections and Rehabilitation.

PERLUSS, P. J.

We concur:

ZELON, J.

JACKSON, J.